SUPREME COURT, U. S.
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E. ROBY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-49

STATE OF HAWAII,
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
UNION OIL COMPANY OF CALIFORNIA,
SHELL OIL COMPANY
and CHEVRON ASPHALT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for Respondents

QUESTION PRESENTED

This is a suit by the State of Hawaii to recover treble damages from respondents under section 4 of the Clayton Act for alleged violation of the Sherman Act. In Count One, Hawaii seeks treble damages for injury allegedly suffered in its proprietary capacity as a purchaser of refined petroleum products. Count Two purports to allege an additional cause of action by Hawaii as *parens patriae*—one for treble damages for alleged injury to the

general "economy and prosperity" of the state. On interlocutory appeal, the court below directed dismissal of Count Two.

The question presented is whether, in addition to the right of a state to recover treble damages under section 4 of the Clayton Act for injury to its business or property, and in addition to the right of its citizens, individually or in appropriate class actions, to recover treble damages for injury to their business or property, a state, in its capacity as *parens patriae,* may also sue to recover treble damages under section 4 for alleged injury to its general "economy and prosperity."

STATEMENT OF THE CASE

This is an action by the State of Hawaii against respondents for treble damages under section 4 and for an injunction under section 16 of the Clayton Act (15 U.S.C. §§ 15, 26). The State of Hawaii sued respondents in the District Court of Hawaii in one count charging a conspiracy to fix prices of refined petroleum products in Hawaii to the damage of the state as a buyer of those products (App. 19). A second count, under the Robinson-Patman Act (App. 24), was later abandoned. Successive amendments added additional counts. A fourth amended complaint, in Count One, repeated the conventional Sherman Act claim of the original complaint (App. 59), but added Count Two, which realleged the first 16 paragraphs of Count One—including all the allegations about the nature and scope of the conspiracy—and then alleged (App. 64-65):

> "19. The State of Hawaii * * * brings this action by virtue of its duty to protect the general welfare of the

State and its citizens, acting herein as *parens patriae*, trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.

"20. The unlawful contracts * * * have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:

"(a) revenues of its citizens have been wrongfully extracted from [the economy of] the State of Hawaii;

"(b) taxes affecting the citizens and commercial entities have been increased to [offset] such losses of revenues and income;

"(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;

"(d) the full and complete utilization of the natural wealth of the State has been prevented;

"(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;

"(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

"(g) the Hawaii economy has been held in a state of arrested development" (App. 65).

Count Three purported to allege a class action for a class consisting of every purchaser of refined petroleum products in the state (App. 65, 66). The district court dismissed this count as involving an unmanageable class, but without prejudice to pleading a proper class or classes (App. 96). An offer by the district court to certify this order of dismissal for interlocutory appeal under 28 U.S.C. § 1292(b) was rejected by petitioner (App. 81).

Respondents moved to dismiss Count Two on the ground that the complaint does not state a claim for relief *parens*

patriae and that, in any event, no *parens patriae* action will lie for recovery of damages under the Clayton Act (App. 45, 68). It was pointed out that Count Two was unnecessary to enable Hawaii to obtain injunctive relief because Hawaii could obtain full injunctive relief under Count One if the allegations of that count were proved, and Count Two contained no substantive allegations not borrowed from Count One.

The district court declined to dismiss the *parens patriae* count. In ruling on this count, the court carefully reviewed and gave effect to the many decisions of this Court holding that a state, suing as a sovereign in its capacity as *parens patriae*, does not have standing to recover damages suffered by its citizens as individuals (App. 88-89):

> "An analysis of the above cases indicates that if a state is to maintain an action in its *parens patriae* capacity, *initially* the facts must show that the state has an interest 'independent of and behind the titles of its citizens,' *Georgia v. Tennessee Copper Co., supra* [206 U.S. 230]; 'has an interest apart from that of the individuals affected,' *Pennsylvania v. West Virginia, supra* [262 U.S. 553]; 'must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest,' *Oklahoma v. Cook, supra* [304 U.S. 387]; '[it] must appear that the controversy to be determined is * * * not a controversy in the vindication of grievances of particular individuals,' *Louisiana v. Texas, supra* [176 U.S. 1]. Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. (At this stage, we do not concern ourselves with the nature of proof.) So, here, the State in the guise of *parens patriae* cannot recover for the indi-

vidual and several possible damage claims of its many citizen-consumers of petroleum products. As the preceding cases unmistakably set forth, and as the dissent in *Georgia v. Pennsylvania R. Co., supra,* points out:

> " 'The inhabitants of the State who have suffered injury or who are threatened with injury by the unlawful practices alleged * * * are alone entitled to seek a legal remedy for their injury, and are the proper parties plaintiff in any suit to enforce their rights which are alleged to have been infringed. It has long been settled by the decisions of this Court that a State is without standing to maintain suit for injuries sustained by its citizens and inhabitants for which they may sue in their own behalf' " (324 U.S. 473).

Nevertheless the district court held that the state could sue in its capacity as *parens patriae* to recover treble damages under section 4 of the Clayton Act for any "deleterious impact upon the general welfare or economy of the state" (App. 90):

> "While a state may not sue, *parens patriae,* for the recovery of possible individual damages or claims of its inhabitants, nevertheless if defendants' acts have a deleterious impact upon the general welfare or economy of the state, a state has standing to sue for both financial and injunctive relief in a *parens patriae* capacity."

On interlocutory appeal, certified under 28 U.S.C. § 1292(b), the court of appeals reversed the decision of the district court (App. 100). The court of appeals observed at the outset that no question concerning the class action was before it (App. 102, n. 3). It emphasized that Hawaii's claim under Count Two was for alleged injury to the general economy and prosperity of the state as a politically and socially organized community, an injury which Hawaii

asserted had an existence independent of any injury to the state in its proprietary capacity, or to its citizens individually or in the aggregate (App. 104-105):

> "Hawaii's claim does not constitute an effort to prevent unjust enrichment by the wrongdoers through recovery by the state, for the affected consumers or for itself, of the total of direct injuries suffered by persons who are unable to seek recovery for themselves. Hawaii's claim is over and above all such recovery by persons, or on behalf of classes, and is asserted to have independent existence quite apart from such direct injuries."

The court pointed out that "the general economy is an abstraction," and expressed doubt that "an independent harm to the general economy" could exist (App. 105). However, "assuming *arguendo* that the general economy can suffer injury from antitrust violations independent of the injuries suffered by private persons or by the state in its proprietary role," it held upon two closely related grounds that Hawaii's claim for treble damages was clearly outside the scope of section 4 of the Clayton Act: (1) an injury to the general economy of the state, separate and apart from an injury to the state in its proprietary capacity, is not an injury to the "business or property" of the state; and (2) any such injury would be so incidental, remote and consequential as to fall far outside the area of direct injury contemplated by the Clayton Act (App. 105-106).

The court concluded (App. 106):

> "Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that § 4 as it now stands can be construed to make such recovery available."

SUMMARY OF ARGUMENT

I. A. This Court's decisions, reiterated and summarized in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439, establish that the *parens patriae* concept does not embody suit by a state upon injuries sustained by its citizens or measured by their loss. Moreover, the right to damages for an antitrust violation is solely a creature of statute (Clayton Act, § 4). Since that Act creates no cause of action for unjust enrichment, and since also the doctrine of unjust enrichment never permits recovery by anyone but the party at whose expense the wrongdoer has been enriched, a state cannot under unjust enrichment doctrine recover for antitrust damages sustained by its citizens. Nor may it recover damages measured by its citizens' loss, for the Clayton Act confers on a suitor the right to recover only for his own damages. To permit a state to recover for other than damage suffered in its proprietary capacity would be to impose a fine at the suit of a state, a sanction not provided by any federal law.

B. No action lies for damage under the Clayton Act for supposed injury to a state's "general economy and prosperity," which is an intangible abstraction different both from the damages to it in its proprietary capacity and the sum total of damages to its inhabitants. This follows from (1) the very nature of the interest which *parens patriae* doctrine permits a state to vindicate by suit and (2) the nature of the injury for which alone the Clayton Act has authorized a suit for damages. The two are diametrically inconsistent.

1. All *parens patriae* proceedings have been in equity. Those proceedings originated as a branch of the prerogative power of the crown which it exercised by the chancellor; in the United States *parens patriae* doctrine further developed

in decisions dealing with the original jurisdiction of the Supreme Court. Both in its origin and its development the rationale of the *parens patriae* suit has been the protection of interests of the state as sovereign or quasi-sovereign, interests not measurable by a money calculus. To convert a *parens patriae* preceeding into one for damages would depart from the tradition and underlying reason of the proceeding. The district court granted this to be true, but it incorrectly read *Georgia v. Pennsylvania R. Co., supra,* as containing dictum permitting a suit for damages. The passage which is incorrectly read simply held that nothing in the antitrust laws prevents a state from maintaining, under those laws, *parens patriae* suits of a kind "long recognized," that is, suits in equity, and the Court was addressing itself to Georgia's right to seek an injunction.

2. Petitioner's request to the Court to create new *parens patriae* law by expanding standing to sue to damage suits ignores the fact there must still be a cause of action. The antitrust cause of action for damages is statutory, and the statute (Clayton Act, § 4) confines it to injuries to "business or property." A state's interest in its "general economy or prosperity" is not "business or property." It is a non-proprietary interest "beyond its property rights" (*Kansas v. Colorado* (1907) 206 U.S. 46), "independent of and behind the titles of its citizens" (*Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230), of the nature of things before the concept of property even evolved (*Geer v. Connecticut* (1896) 161 U.S. 519), pertaining to sovereignty or quasi-sovereignty. This is poles apart from the mundane commercial interest or commercial impact which all the cases construing the expression "business or property" in Clayton Act, § 4, concur that it delineates. The inapplicability of § 4 is

underscored by contrast with Clayton Act, § 16, which permits injunctive relief against any threatened loss or damage and is not limited to "business or property." As taught in *In Re Debs* (1895) 158 U.S. 584, the sovereign in the exercise of its governmental powers is entitled to equitable relief though it has no pecuniary interests to protect.

3. Congress understandably granted a narrower right to damages than to equitable relief because it knew that it could entrust a broader range of inquiry to judges in equity while requiring adherence to some standard of measurability in actions triable by a jury. An issue as amorphous as "adverse effect on the general economy" of a state is not jury triable, if justiciable at all. The question is not one of proof but of right to sue at all, for the leeway of the Clayton Act in ascertaining damages is given only after a plaintiff establishes himself on the solid platform of injury to his "business or property."

4. Hawaii's proprietary claim to damages as a purchaser and the claims of its citizens to recover in suits brought by them individually or in appropriate class actions for injury to their business or property comprise all possible claims for damages resulting from injury to anyone's "business or property." In seeking more, Hawaii should address its arguments to Congress. No argument upon the language or holding of the opinion in *Georgia v. Pennsylvania R. Co., supra,* remotely supports petitioner's claim under the *parens patriae* count of its complaint.

II. One whose injury is an incidental or remote consequence of a violation of the antitrust laws has no standing to recover damages under the Clayton Act. A rational causative link must exist between the offense and the alleged injury. Regardless of how liberally this standing rule is construed, an "adverse effect" upon the general

"economy and prosperity" of a state is so indirect, remote and consequential as to fall far outside the area of directness required by the Clayton Act.

III. Over and beyond what is stated in Points I and II above, the decisions of this Court make clear that Hawaii's complaint does not set out a cause of action which a state has standing to assert *parens patriae,* either for damages or for an injunction. A conspiracy (in this case to fix prices), the direct and immediate impact of which falls upon individual purchasers who have an adequate conventional remedy presents a controversy in which individual citizens are the real parties in interest and is totally outside the well-defined area of *parens patriae.* This is the teaching of *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277, which was expressly reaffirmed in *Georgia v. Pennsylvania R. Co.* (1945) 324 U.S. 439.

IV. There is no basis in the record for petitioner's argument that the district court, in dismissing the class action count, foreclosed any effective remedy to the many purchasers of gasoline in Hawaii. The district court held, only, that a class composed of every purchaser of petroleum products in Hawaii is unmanageable and therefore not in compliance with Rule 23 of the Federal Rules of Civil Procedure. Its order was without prejudice to the pleading of a proper class action, and petitioner declined the court's offer to certify its class action ruling for simultaneous interlocutory appeal with its *parens patriae* ruling.

ARGUMENT

I. NO PARENS PATRIAE ACTION LIES FOR DAMAGES UNDER THE CLAYTON ACT.

Preliminary to the question whether a *parens patriae* action lies for damages under the Clayton Act is the ques-

tion of what kind of recovery is embodied in the novel concept of a *parens patriae* suit for damages. An answer to that subsidiary question will sharpen the principal issue.

A. Parens Patriae Concepts Do Not Permit Recovery by a State of Damages Sustained by Its Citizens or Measured by Their Loss.

The district court, while sustaining Hawaii's right to maintain a *parens patriae* action for damages, made it clear that it did not agree that under that or any other guise a state may recover the damages sustained by its citizens. In its opinion that court made a statement which we quote at some length at pp. 4-5 *supra*, for its documentation of this Court's decisions to that effect. But in this Court Hawaii returns to a claim, rejected by the district court and abandoned by Hawaii in the court of appeals and therefore not considered by that court, that, *parens patriae*, a state may sue for damages sustained by its citizens and put the recovery in the state treasury.[1] And that appears to be the gist of the brief of California as *amicus curiae*. Two different arguments are tendered to escape settled law.

The first is that this Court should boldly create new law. The second is that recovery might be predicated on the doctrine of unjust enrichment. The two arguments run in essence as follows: The alleged conspiracy has taken money out of the pockets of the citizens of Hawaii, it is abhorrent that a wrongdoer should keep ill-gotten gains, and the gain, trebled, should therefore be given, not to those injured, but to the state. This novel theory is not one of recompense to a plaintiff for injury in its "business or property" or even of recompense for injury to it in any capacity. It is a theory

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1. Hawaii does not say whether both it and its citizens may each recover treble the amount of all claims, or whether Hawaii may and has expropriated the claims of all its citizens.

of allowing a state to recover from defendants as a punishment for violation of a Federal law, measuring the recovery by relating it to injury to its citizens in some undefined way. Thereby, under the guise of recovery of damages, a state would be able to fine a supposed violator of Federal law in amounts not confined to the limits of the penalties to which the United States is confined by section 1 of the Sherman Act. Obviously, the doctrine of unjust enrichment is not available, for that doctrine never permits recovery by anyone but the party at whose expense the wrongdoer has been enriched (RESTATEMENT, RESTITUTION § 1). And, equally obviously, the Clayton Act creates no cause of action for unjust enrichment.

Yet, it cannot be forgotten, a private, Federal right of action for conspiracies in restraint of trade does not issue out of the common law but is purely the creation of Congress. There is no right of action under the antitrust laws except as "a federal statute has created that right" (*Nashville Milk Company v. Carnation Company* (7 Cir. 1956) 238 F.2d 86, 88, affirmed (1958) 355 U.S. 373). The rights and remedies of one seeking damages under the antitrust laws arise exclusively from section 4 of the Clayton Act (*Vance v. Safeway Stores* (D.N.M. 1956) 137 F.Supp. 841, 845, 846, affirmed as to this point (1958) 355 U.S. 389).

It follows that a state cannot recover on a theory of unjust enrichment. It also follows that it cannot recover on the basis of damages sustained by someone else, albeit they are its citizens, for the Clayton Act confers on a suitor the right to recover for his own damages alone.

And such is the precise holding in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), where the court denied leave to Kansas and California to

amend their complaints to allege a right to recover damages under the Clayton Act as *parens patriae*.

In *Georgia v. Evans* (1942) 316 U.S. 159, this Court held that a state is a "person" within the meaning of section 4 of the Clayton Act, and could bring a treble damage action under that section for injury suffered in its proprietary capacity. In so ruling, this Court construed section 4 to give to a state the same remedy—nothing more—available to other purchasers injured by an antitrust violation (316 U.S. 162):

> "The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act."

The right of a state to sue for treble damages under the antitrust laws—the same right which is available to all other persons and which was sustained by this Court in *Georgia v. Evans*—is the right which Hawaii asserts in Count One of the complaint. This right is not in issue here.

B. No Parens Patriae Action, Under the Clayton Act, Lies for Any Damages at All.

Hawaii falls back on a claim that what it seeks to recover, *parens patriae*, is damages to an inchoate abstraction called injury to its "general economy and prosperity"—an intangible something (1) different from damages to it in its proprietary capacity, and (2) different from the sum total of damages to any and all of its citizens and inhabitants.

The question whether any such cause of action exists has nothing to do with questions of quantum of proof. It goes

directly to the very nature of the cause of action existing in (1) a *parens patriae* suit (2) under the Clayton Act. It is essential to observe the two different elements involved: (1) the nature of a *parens patriae* suit, and (2) the nature of the cause of action for treble damages created by Congress. Expressed somewhat differently, one must examine both standing to sue and cause of action or claim for relief. Both must exist. The question of standing is whether the state, as sovereign, may be heard at all as a litigant, if an actionable wrong has occurred. But in order for a litigant to be heard, there must be a cause of action.

Analysis of these two concepts will reveal that the nature of the interest which the doctrine of *parens patriae* permits a state to vindicate by suit is diametrically inconsistent with the nature of the injury for which Congress has authorized a suit for damages under the Clayton Act. The two cannot coexist.

1. BECAUSE OF THE VERY NATURE OF THE INTEREST FOR WHOSE VINDICATION A PARENS PATRIAE SUIT LIES, SUCH A SUIT IS SOLELY IN EQUITY.

All *parens patriae* suits in Anglo-American history have been in equity. In no case to our knowledge has a state been permitted to recover damages in such an action on any kind of claim, statutory or non-statutory. In the more than 80 years since the enactment of the Sherman Act no state has ever asserted any such claim. This Court in *North Dakota v. Minnesota* (1923) 263 U.S. 365, 373-74, reviewed some of the typical *parens patriae* cases:

> "[A] suit by one State to enjoin [pollution] * * *. *Missouri v. Illinois,* 180 U.S. 208, 241; s.c. 200 U.S. 496, 518. * * * [A] bill to restrain * * * a diversion of water * * *. *Kansas v. Colorado,* 185 U.S. 125, 141, 143; s.c. 206 U.S. 46, 95. In *Wyoming v. Colorado,* 259 U.S. 419, 464, it granted relief to one State to prevent * * *

diverting water * * *. In *Georgia v. Tennessee Copper Co., supra,* it enjoined * * * the generation and spread of noxious fumes * * *. In *Pennsylvania v. West Virginia,* 262 U.S. 553, 592, * * * this Court has enjoined [enforcement of a statute] * * *."

Proceedings *parens patriae* originated as a "branch of the prerogative power of the king * * * which he exercises by the chancellor," Taney, C.J. in *Fontain v. Ravenel* (1854) 58 U.S. (17 How.) 369, 391. Equity jurisdiction stems from the same royal prerogative, first exercised by the sovereign to remedy defects in the common law, and later delegated by the sovereign to his direct agent, the Chancellor. 1 LAWRENCE, EQUITY JURISPRUDENCE, §§ 20, 23-29 (1929). The *parens patriae* proceeding antedates the equity jurisdiction as a more immediate application of the royal prerogative. *Fontain v. Ravenel, supra;* STORY (Mr. Justice), EQUITY PLEADINGS, §§ 8, 49 (10th Ed. Gould 1892).[2] The law defining the quasi-sovereign interests which are justiciable in actions by the States of our Union in their capacities as *parens patriae* has further developed, with few exceptions, in the decisions of this Court dealing with its original jurisdiction.[3]

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2. Story, § 49:
"In the first place, then, let us consider who may sue in equity. The king or government may (as has been already stated) sue in a court of equity, not only in suits strictly on behalf of the crown or government, for its own peculiar rights and interests; but also on behalf of the rights and interests of those who partake of its prerogative, or claim its peculiar protection."

3. The principles underlying these cases are to be distinguished from the exercise by the states of what formerly was that part of the Royal Prerogative of the King to sue *parens patriae* as guardian of "infants, lunatics and idiots" and as superintendent of "all charities." (See for a discussion of this exercise of the *parens patriae* powers of the states, Malina and Blechman, "Parens Patriae Suits for Treble Damages Under the Antitrust Laws" (1970) 65 Nw. U. L.Rev. 193, 197, et seq.)

The very rationale of a *parens patriae* suit relates to the protection of the interests of the state as a sovereign or quasi-sovereign in the common welfare of its citizens as a whole, and those interests are not measurable by a money calculus. The sovereign may levy fines, but otherwise it protects its own interests by "specific or preventive relief."[4] Injury to the state in its capacity as *parens patriae* is, by its very nature, not susceptible of monetary measurement, e.g., jeopardy to the health, comfort and welfare of a state's citizens by withholding the state's fuel supply[5] or by discharging the sewage of a huge metropolitan area into streams and rivers flowing through adjacent states.[6] It is precisely for situations like these that equity devised its remedies:

> "It is a general rule that, where a complainant shows that the injury threatened will be an irreparable one, a court of equity will grant relief by an injunction.
>
> * * * * *
>
> "* * * [A]n injury is * * * irreparable * * * when the damages which may result therefrom cannot be measured by any certain pecuniary standard" (1 Joyce on Injunctions (1900) pp. 70-72).

In short, to convert a *parens patriae* proceeding into one for damages would not only be historically novel, it would

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4. The fundamental difference between the kind of relief awarded at law and that in equity is recognized in statutory enactments in various states borrowed from the Field draft code of 1865. As there shown "specific and preventive relief" is the province of equity; "specific and preventive relief" is the instrument by which the sovereign has protected its interests.

5. *Pennsylvania v. West Virginia* (1923) 262 U.S. 553, 592.

6. *Missouri v. Illinois & Chicago District* (1901) 180 U.S. 208, 241.

be a departure from the whole tradition and underlying reasoning of the proceeding; it would be the creation of new rights and new remedies palmed off under an old and traditional label.

The district court recognized this history. Said it (App. 76):

> "Were it not for the words of Justice Douglas in that divided-Court decision in Georgia versus Pennsylvania Railroad, the problem would be simple, because, going down through the cases that have touched upon *parens patriae* and its use in the field of law, it only involved equitable relief."

But, we submit, the district court failed to read correctly what this Court had said in *Georgia v. Pennsylvania R. Co.* What it there said was (324 U.S. 447):

> "But Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy [which] * * * injured the economy of Georgia. * * * when it came to other sanctions Congress * * * authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae, have long been recognized.* There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts" (emphasis added).

This is clear language. What this Court there plainly said was: There is no reason why "those suits," that is, suits by a state *parens patriae* which have long been recognized, should be excluded from the purview of the anti-trust acts. But the suits which "have long been recognized" as maintainable *parens patriae* were solely suits in

equity. That is all that this Court dealt with in *Georgia v. Pennsylvania R. Co.* It is all that it was there speaking about. To assign to this Court's words an embracement of suits for damages would be to attribute dictum to it on a subject not before the Court and, more than that, dictum which its words simply do not carry.

In *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), the court denied leave to Kansas and California to amend their complaints to allege a right to recover damages under the Clayton Act as "*parens patriae*." Referring to all *parens patriae* citations other than the district court's decision in the instant case, it said (p. 1058):

> "In essence, they are cases which dealt, as defendants point out, only with the propriety of suits 'parens patriae' for *injunctive or other equitable relief*" (italics in the original).

And of *Georgia v. Pennsylvania R. Co.* it said (p. 1060):

> "In the *Georgia* case, *supra*, the * * * Court ruled, however, that Georgia *would not be permitted to recover damages*" (italics in the original).

If there were any doubt as to the correct meaning of *Georgia v. Pennsylvania R. Co.*, it is quickly dispelled by a review of history and the state of jurisprudential analysis at the time the Sherman and Clayton Acts were enacted. In *Kansas v. Colorado* (1906) 206 U.S. 46, 99, the Court remarked:

> "*Beyond its property rights* it [Kansas] has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State" (emphasis added).

It was this interest—"*beyond its property rights*"—that gave rise to a right to proceed *parens patriae*. In much the

same language and expressing precisely the same idea, handing down its decision in *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237 (per Holmes, J.), on the very same day as *Kansas v. Colorado,* this Court said:

> "The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

In its very first decision confirming in the States of the Union the right to sue in a *parens patriae* capacity — *Louisiana v. Texas* (1900) 176 U.S. 1—this Court based its ruling in part upon its earlier pronouncement in *In Re Debs* (1895) 158 U.S. 564, which discussed the broad principles applicable to injunctive relief when sought by the sovereign in the exercise of its powers to preserve the general welfare. The Court in the *Louisiana* case pointed out (176 U.S. 19):

> "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae,* trustee, guardian or representative of all her citizens."

And it relied upon and quoted from what the Court had earlier said in *Debs* (158 U.S. 584, 586):

> "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the

matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. This proposition in some of its relations has heretofore received the sanction of this court.

* * * * *

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

2. THE CLAYTON ACT PROVIDES FOR DAMAGES ONLY TO "BUSINESS OR PROPERTY." ADVERSE EFFECT ON A STATE'S GENERAL ECONOMY IS NOT "INJURY TO BUSINESS OR PROPERTY."

In short, to ask the Court to hold that a *parens patriae* suit can be maintained for damages is to ask it to create new law. The briefs of Hawaii and of *amici curiae* call on the Court to do just that. But the cause of action sought to be pleaded in this case does not arise from decisional law. It rests on an Act of Congress. Whatever may be a court's powers to break new ground in non-statutory areas it cannot create rights whose existence rests solely in the hands of Congress.

Thus, even if *parens patriae* prineiples permitted a state to sue for damages, it would still be necessary that there be a cause of action on which it could sue. If there were a non-

statutory cause of action, as in tort or for breach of contract, that would be one thing. But here the cause of action must be found in a Federal statute or it cannot exist, and a court cannot create what Congress has not created.

We therefore turn to the words of the Clayton Act as the absolute touchstone. Section 4 of the Clayton Act (formerly section 7 of the Sherman Act) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (15 U.S.C. § 15).

Thus the Clayton Act provides a cause of action for damages for any person who shall be injured in his "business or property." Injury or adverse effect upon a state's "economy and prosperity" are not injury to "business or property."

The district court's answer to the fact that the Clayton Act permits recovery only for injury to "business or property" was this (App. 93):

> "If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word 'property', even though it does not fall within the normal, simple definition of 'business and property' under Section 4 of the Clayton Act."

We respectfully submit not only that the reasoning is unsound on its face, but that the contrary necessarily is plain from *Georgia v. Pennsylvania R. Co.* itself. There the Court followed the rule that a *parens patriae* suit lies only when a state sues in a sovereign or quasi-sovereign capacity for injuries to the state as a socially organized entity, as

distinguished from injuries to interests "which are proprietary." It said (324 U.S. 447-448):

> "* * * the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'"

The Court sharply contrasted the right of a state to proceed *parens patriae* with its right to sue as any other person for injuries to its "proprietary interests." Thus *Georgia* clearly recognized that an action *parens patriae* cannot be maintained for injuries "which are proprietary." But the language of section 4 relates only to interests "which are proprietary."

The court below was plainly correct when it pointed out (App. 105-106):

> "An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under § 4. *Georgia v. Evans*, 316 U.S. 159 (1942). Such was the basis for Hawaii's Count I. But the terms 'business or property' are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community * * *. Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly."

This conclusion is obvious whether examined from the standpoint of the kind of interest with which the *parens patriae* doctrine is concerned or from the standpoint of the

antitrust decisions applying the concept of "business or property." Examined from both standpoints the conclusion is inescapable.

As we have seen at pages 18-20 above, the kind of interest *parens patriae* is designed to vindicate is a non-proprietary interest. The concept of "general economy or prosperity" involved in *parens patriae* doctrine is even more intangible than the juristic notion of *res communes*. To see in perspective what juristic concepts the Court had in mind when, in *Kansas v. Colorado* (1907) 206 U.S. 46, 99, it used the phrase "beyond its property rights" and when, in *Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237, it referred to the interest a state has "independent of and behind the titles of its citizens," one may well refer to *Geer v. Connecticut* (1896) 161 U.S. 519, 525, decided only shortly after enactment of the Sherman Act.[7] The interest which a state has "beyond its property rights" or "independent of and behind the titles of its citizens" conceptually antedates the kind of "negative community" which itself antedates in juristic theory the division of nature's resources into objects of property rights. It is this kind of interest with which *parens patriae* is concerned. And it is poles apart from the mundane commercial "business or property" of section 4 of the Clayton Act.

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7. There the Court reviewed concepts basic in English legal texts reached via the jurists of the middle ages from the Roman jurisconsults:

> "* * * Pothier moreover says: 'The first of mankind had in common all those things which God had given to the human race. This community was not a positive community of interest, like that which exists between several persons who have the ownership of a thing in which each has his particular portion. It was a community, which those who have written on this subject have called a negative community, which resulted from the fact that those things which were common to all, belonged no more to one than to the others, and hence no one could prevent another from taking of these common

Every decision to our knowledge dealing with the antitrust concept of "business or property" gives that concept a signification of commercial impact. In addition to the citations of the court below,[8] there are many others.[9] *Broadcasters Inc. v. Morristown Broadcasting Corp.* (D. N.J. 1960) 185 F. Supp. 641, 644, states that in the Clayton Act "the term 'business or property' is used in the ordinary sense and denotes a commercial venture or enterprise." In its ordinary sense "business" denotes " 'the employment or occupation in which a person is engaged to procure a living' " *Roseland v. Phister Mfg. Co.*, 125 F.2d 419. And, when used in the same sense, the word "property" simply cannot be stretched to include an interest not susceptible of ownership or possession and as inchoate as the general econ-

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things that portion which he judged necessary in order to subserve his wants. Whilst he was using them others could not disturb him, but when he had ceased to use them, if they were not things which were consumed by the fact of use, the things immediately re-entered into the negative community, and another could use them. The human race having multiplied, men partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community.' No. 21

"Referring to those things which remain common in what he qualified as the negative community, this great writer says:

'These things are those which the jurisconsults called res communes. Mercien refers to several kinds—the air, the water which runs in the rivers, the sea and its shores.' "

8. *Martin v. Phillips Petroleum Company* (5 Cir. 1966) 365 F.2d 629, cert. denied (1966) 385 U.S. 991; *Duff v. Kansas City Star Company* (8 Cir. 1962) 299 F.2d 320; *Roseland v. Phister Mfg. Co.* (7 Cir. 1942) 125 F.2d 417.

9. E.g., *Image and Sound Service Corp. v. Altec Service Corp.* (D. Mass. 1956) 148 F.Supp. 237, 239; *Peller v. International Boxing Club* (7 Cir. 1955) 277 F.2d 593, 595-596; *Triangle Conduit & Cable Co. v. National El. Prod. Corp.* (3 Cir. 1945) 152 F.2d 398, 399-400.

omy or prosperity of a sovereign state. These concepts rest solidly upon the fundamental nature of the antitrust laws which are "tailored * * * for the business world," with outer bounds being "commercial impact" (*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 141).

Waldron v. British Petroleum Co. (S.D. N.Y. 1964) 231 F.Supp. 72, is cited by petitioner for a broad definition of the meaning of the word "property." But the holding in *Waldron* was merely that a business contract having a commercial value is property within the purview of the Clayton Act. In *Hamman v. United States* (D. Mont. 1967) 267 F.Supp. 420, 432, appeal dismissed (9 Cir, 1968) 399 F.2d 673, the court construed *Waldron's* broad definition as relating only to commercial interests and therefore as not reaching a right of consortium, albeit consortium is an interest protected by law.

Petitioner contends that the decision of this Court in *Georgia* must be read as affirming sub silentio a state's right to recover treble damages in its capacity as *parens patriae*. The argument runs (Br. 38-39[10]) that sections 4 and 16 of the Clayton Act have an identity of purpose and that this Court could not have recognized Georgia's right to sue for an injunction without necessarily holding that it had suffered an injury to its "business or property." The court below rejected this contention, and properly so, pointing out (App. 104):

> "Section 16, 15 U.S.C. § 26, is far broader than § 4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by such a violation."

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10. The Brief for the Petitioner is referred to herein as "Br."

Section 4 is specific in its limitation of damages to those which are caused by injury to the plaintiff's "business or property." In contrast, section 16 provides a remedy by injunction:

> "• • • against threatened loss or damage by a violation of the antitrust laws • • • when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity • • •."

Thus, the language of section 16 is comprehensive and provides for injunctive relief against any threatened loss or damage caused by a violation of the antitrust laws, such relief to be measured by the "principles" governing the general exercise of the powers of courts of equity. But section 4 is confined to a very particular kind of loss or damage, that to "business or property" and to nothing else.

The language is clear; the distinction is clear. Normally, the kind of damage encountered is to "business or property." But if in a given case there is threatened loss or damage beyond the categories of damage to "business or property," the language of section 16 may reach it while that of section 4 does not. And the obvious situation where this is so is precisely when a state sues *parens patriae*. There, as clearly taught in *In Re Debs* (1895) 158 U.S. 564, discussed at pages 19-20 above, injunctive relief may be granted under the "principles" of equity although the sovereign has no pecuniary interest of any kind.

The gist of the matter is simply this: section 4 of the Clayton Act authorizes recovery only for injuries to one in his "business or property." The basis upon which any *parens patriae* suit proceeds and the basis upon which a damage suit under the Clayton Act is authorized are mutually exclusive. The *parens patriae* suit lies only for protection

of the sovereign against injury to it in its sovereign or quasi-sovereign capacity. The general "economy and prosperity" of the state, protectable in such suits, is not "business or property."

3. THE ISSUE PETITIONER SEEKS TO TRY IS BEYOND THE CAPACITIES OF JUDICIAL ADMINISTRATION.

It is not difficult to understand why Congress by the Clayton Act granted a broader right to seek equitable relief than to recover damages. A suit for damages is triable by a jury, a suit in equity by the court. Even in proprietary situations, determination of whether there has been damage and then its assessment leave a broad range of uncertainty. Transplant them to a determination of injury to an abstract notion of "general economy and prosperity" and one passes into another dimension. A judgment in an action at law looks to the past. If error or excess should occur in the fact-finding in an action at law, the result can be unimaginably punitive and unjust. By contrast a decree in equity looks to the future. It does no more than set guidelines for the future to which all can adapt themselves. Congress could well have concluded that it could entrust the broader range of inquiry to judges in equity while requiring adherence to a standard of measurability in actions triable by jury. As this Court, through Mr. Justice Brandeis, said in *Keogh v. C.&N.W. Ry. Co.* (1922) 260 U.S. 156, 165:

> "• • • recovery [of damages under the Clayton Act] cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable."

An issue as amorphous as injury or "adverse effect" to the general "economy or prosperity" of a state simply does not

present a justiciable issue, let alone an issue which under any rational system of law could be submitted to a jury.[11] This was recognized by the State of Georgia itself in the *Georgia* case. Its bill of complaint, addressed to this Court

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11. An illustration of how impossible it would be for a jury to attempt to ascertain damages is furnished by a recent comprehensive study published by Hawaii itself (Department of Planning and Economic Development, "The Economy of Hawaii" (1969)). The study points out that during the very time Hawaii contends in this case its "economy has been held in a state of arrested development" (App. 65), its economy in fact dramatically expanded (pp. 3, 5):

> "Dramatic as the Nation's economic expansion has been, Hawaii's has been more dramatic. Further, this expansion has been shared in some degree by all sectors of Hawaii's economy.
>
> "Indeed, Hawaii has experienced a population and labor force explosion, and yet the State's unemployment rate has been consistently below the national rate. In consequence, Hawaii's production of goods and services and its personal income have expanded much faster than the Nation's.
>
> • • • • •
>
> "The most rapid population growth continues to be in Honolulu. But the Neighbor Islands are also growing, and recent developments seem to forecast rapid expansions of their economies in the years ahead."

The study goes on to point to the most impressive factors of growth. Hawaii's population expanded 24 per cent between 1960 and 1968, twice the national rate. The Department referred to this growth as "phenomenal" (pp. 7, 8). Since 1963, Hawaii's unemployment "remained below 4 per cent of the state's total labor force—a low rate by mainland standards and one which attests to the promptness with which newcomers have been absorbed into employment roles" (p. 9). Hawaii's unemployment rate in September 1968 was only 2.7 per cent. The Department commented: "Instead of too few jobs, as in the early post World War II years, Hawaii in recent years has been experiencing a growing labor shortage" in spite of a labor force which increased by 20 per cent between 1961 and 1967 (p. 9). Large employment expansions occurred, for example, in the research and development, computer services, communications, transportation equipment, investment, insurance, banking, medical and tourist-related industries (p. 16).

The Department stated that "the rapid increase in workers, and employment, in Hawaii has been accompanied by rapid increases in the State's output of goods and services" (p. 17). Thus, Hawaii's gross product, "the value of all goods produced and all services performed by the state's economy," rose from approximately $1.9 billion in 1961 to $2.9 billion in 1967, an increase of more than half in six years.

"sitting as a court of equity," did not, as *parens patriae,* seek treble damages under the Clayton Act. Rather, it sought "token damages" for alleged injury to its general economy and prosperity for the very reason that actual damages would be impossible to ascertain. Count 2 of Georgia's amended complaint—its *parens patriae* count—stated:

> "It is likewise impossible accurately to calculate the damage done to the people of Georgia over the decades as an organized community as a direct result of the acts of the defendants complained of herein. * * * It is respectfully requested that the Court award the State of Georgia token damages as a representative of the people—as a quasi-sovereign—in an amount which the State of Georgia submits should not be less than five million dollars."

In its brief in this Court Georgia conceded that the alleged injury to the state as quasi-sovereign "transcends measurement in pecuniary terms" and is "perhaps incapable of estimate in money" (Brief on Behalf of the State of Georgia on Motion to File Amended Bill of Complaint, pp. 7, 29).

The question is not one of proof. The effort fails at the threshold. Although the Clayton Act gives broad leeway in ascertaining and fixing damages, it does so only after a plaintiff has established himself upon a solid platform, namely, that there has been injury to him in his "business or property." There must, at least, be that platform. When Congress has prescribed the basic prerequisite that the injury must be to one "in his business or property," it may not be presumed that by the qualifying phrase Congress meant nothing at all and intended to allow recovery of damages for any kind of injury.

Hawaii may recover damages sustained by it in its proprietary capacity. So also can its citizens, individually or in appropriate class actions, recover for injury to their business or property. These two categories of claims comprise all of the damages resulting from injury to the business or property of anyone — the state and all its citizens. In seeking more, Hawaii and the *amici curiae* should address their arguments to Congress, where they may be subjected to consideration by the kind of machinery best adapted to the matter—legislative committees and the rest of the apparatus of the legislative process (*Lauritzen v. Larsen* (1953) 345 U.S. 571, 593). The words of the court below bear repeating (App. 106):

> "Compensation of the public (let alone treble damages) for injury of such an extraordinary character presents policy questions which, in our view, should be subjected to close Congressional inquiry and study. We do not believe that § 4 as it now stands can be construed to make such recovery available."

4. THE RELIANCE OF THE PETITIONER ON GEORGIA v. PENNSYLVANIA R. CO. IS MISPLACED.

Georgia, in its bill of complaint in the *Georgia* case, prayed for damages under section 4 of the Clayton Act only in its capacity as proprietor, a claim which was treated by this Court as a makeweight, and was later waived by Georgia. In its *parens patriae* count, Georgia did not, as noted above, seek "damages" in a legal sense, but prayed for "token damages" only for the very reason that actual damages would be impossible to ascertain.

Far from considering or passing on the question whether treble damages under section 4 of the Clayton Act are recoverable in a *parens patriae* action this Court in *Georgia* specifically confined its ruling to the question of equitable relief, as the court below recognized (App. 103-104). After

quoting from section 16 of the Clayton Act, the Court said: "It must be remembered that this is a suit to dissolve an illegal combination or to confine it to the legitimate area of collaboration" (324 U.S. 460). The Court then stated (p. 462):

> "Dissolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here."

The district court in *Philadelphia Hous. A. v. American Radiator & S. San. Corp.* (E.D. Pa. 1969) 309 F.Supp. 1057, appeal dismissed (3 Cir. Feb. 2, 1970), in denying leave to the States of California and Kansas to amend their complaints and add *parens patriae* counts, had occasion to consider the scope of this Court's ruling in the *Georgia* case. It correctly observed that no issue with respect to the right of a state in its quasi-sovereign capacity to recover treble damages under the Clayton Act was before this Court (pp. 1061-1062):

> "Nor does the *Georgia* case, *supra,* itself lend any support to the type of damage claim for which leave to amend is here sought. In fact, in the only '*parens patriae*' claim considered by the Court in its opinion, that set forth in Count 2 of Georgia's complaint, Georgia did not even seek damages on behalf of individual citizens, nor for that matter treble damages under the antitrust laws at all, though it did seek treble damages in its proprietary capacity under Count 3 of its complaint. For in its prayer for relief set forth at pages 24-27 of its complaint, Georgia requested as damages under Count 2, that it be awarded 'token' damages in the amount of five million dollars as a representative of the public as damages for harm and injury to the economy of the state as a whole."

In light of the foregoing it is difficult to find a basis for the surprising conclusion of the district court in the case at bar that this Court in *Georgia* (App. 93):

> "• • • clearly • • • differentiated between suits for damages in the State's proprietary capacity and suits for damages in its quasi-sovereign capacity and held that damages to the State's economy, if proved, were recoverable as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity."

We inquire, then, on what basis the district court concluded—and petitioner and *amici* here contend—that the *Georgia* case "holds" that a state may, in its capacity as *parens patriae,* sue to recover treble damages under the Clayton Act for injury to its general economy, "as a distinct injury, severable from whatever injury it might suffer in its proprietary capacity" (Br. 45-46).

The district court and petitioner here rely solely upon the use by this Court of two plural nouns in the course of its opinion upholding Georgia's standing to sue for an injunction. The district court, adding its own emphasis, quoted from the opinion in *Georgia* (App. 85-86):

> "[W]hen it came to other [than criminal] *sanctions* Congress • • • authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil *remedies,* it restricted the States to suits to protect their proprietary interests.
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> • • • • •
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil *sanctions* of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action [for an injunction] to this Court fail."

Hawaii asserts that "the use of the plural form in all of these [two] words cannot be regarded as coincidental, especially in light of the substantial request for damages of at least five million dollars which Georgia made as *parens patriae*" (Br. 41-42). The damages requested by Georgia as *parens patriae* may indeed have been substantial, but as *parens patriae* Georgia specifically refrained from requesting treble damages under section 4 of the Clayton Act. And no claim such as Hawaii asserts here was before the Court.

Two plural nouns, used incidentally in the course of an opinion, do not constitute a "holding." "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" *(Webster v. Fall* (1925) 266 U.S. 507, 511).[12] In *Georgia*, the question whether a state, suing as *parens patriae*, may recover treble damages under section 4 of the Clayton Act for an alleged injury to its general economy and prosperity did not even "lurk" in the record. No such claim was pleaded, considered by the Court, or anywhere mentioned.

Further, the context of the quoted passage at 324 U.S. 447 is inconsistent with the conclusion petitioner would draw from it. At that juncture of its opinion in *Georgia* the Court was answering the argument that only the Federal government is *parens patriae* to claims based on Federal law. In that connection and for that purpose it was speaking generally about all private suitors, not merely states. This is evident from the sentence immediately preceding what the district court quoted, viz.:

12. See also *Nashville Milk Company v. Carnation Company* (1958) 355 U.S. 373, 376, n. 5, and the dissenting opinion at 383.

> "The enforcement of the criminal sanctions of these acts [federal antitrust acts] has been entrusted exclusively to the federal government."

The following sentence quoted by the district court simply contrasted what was entrusted to the Federal government with what was entrusted to private suitors.

Petitioner and *amici curiae* concede, as they must, that this Court held in *Georgia* that Georgia could not recover damages. In attempting, nevertheless, to find in that decision a basis for a *parens patriae* suit for damages, they argue that the ground for denying damages was that the suit was one for discrimination in freight rates, and, say they, *Keogh v. C. & N.W. Ry. Co.* (1922) 260 U.S. 156, precludes recovery of damages in such a case (Br. 14-15, 42). That argument will not do. The opinion in *Georgia* does refer to the rule of *Keogh*, and that rule did bar Georgia from recovering damages. But this Court's ruling related to damages, if any, suffered by Georgia in its proprietary capacity, i.e., in its suit as a shipper (324 U.S. 435). The basis of the *Keogh* rule is that to award damages to a shipper for charging conspiratorial rates which have been approved by the Interstate Commerce Commission would be tantamount to giving him a preference illegal under the Act to Regulate Commerce. Said the Court in the *Keogh case* (260 U.S. 163):

> "The legal rights of *shipper* as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as between carrier and *shipper*. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. * * * And they are not affected by the tort of a third party. * * * This stringent rule prevails, because otherwise the paramount purpose of Congress — pre-

> vention of unjust discrimination — might be defeated. If a *shipper* could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors" (emphasis added).

In *Georgia* the Court explains and applies *Keogh* in exactly this way, saying (324 U.S. 453):

> "The legal rights of a *shipper* against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between *shipper* and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added * * *" (emphasis added)

then quoting from *Keogh* a passage just quoted above.

Obviously, that reasoning has no application to a *parens patriae* claim for damages to the "general economy or prosperity" of a state, for with respect to such a claim the state is not suing as a shipper. It is simply impossible to read into the discussion in *Georgia* any holding that a *parens patriae* suit for damages under the Clayton Act will lie for damages arising from all conspiracies under the Sherman Act except a railroad rate conspiracy.

II. INJURY MUST BE DIRECT BEFORE RECOVERY IS PERMISSIBLE UNDER THE CLAYTON ACT.

The second ground of decision by the court below is also in accordance with an unbroken line of authority under section 4 of the Clayton Act. As stated by the court (App. 106):

> "Accepting that the general economy can suffer injury from antitrust violations, such injury is indirect

and consequential to a degree and in a sense far beyond that usually discussed in this connection. It has long been established that one whose injury is an incidental or remote consequence of defendant's violation may not recover under the Clayton Act * * *.

"The attenuated injuries alleged by Hawaii fall far outside the area of directness contemplated by the Clayton Act."

Hawaii lays great stress upon an alleged confusion and inconsistency among lower Federal courts with respect to the standing of plaintiffs under section 4 (Br. 18-22). It asserts that the decision of the court below "not only reflects the judicially created chaos surrounding the question of standing under section 4, it proceeds to compound that confusion and further obfuscate standing considerations * * * and thereby weaken[s] the effectiveness of the treble-damage action as a means for enforcing national antitrust policy" (Br. 20).

There is no confusion or inconsistency among lower Federal courts on the question of standing as applied by the court below. Every restraint of trade, it might be argued, affects in some way and to some degree every person in the community. Thus it might be argued that a restraint against a manufacturer in some ways affects its suppliers, public bodies to which it pays taxes, merchants patronized by its employees, the community affected by its financial well-being and even the charities to which it might have made contributions. However, Congress did not vest a cause of action for treble damages in everyone who asserts some connection with an alleged restraint of trade, no matter how removed that connection may be.

This is not to say that section 4 should be narrowly or restrictively interpreted; but to state a cause of action under the statute it is not enough that an ultimate and

remote effect of allegedly illegal conduct, filtered through many layers of the economy, allegedly resulted in "injury." At some point, a line of demarcation must be drawn. This task has fallen on the Federal courts, and they have consistently held over many years that standing to sue under section 4 of the Clayton Act does not extend to persons who are only remotely affected by the alleged illegal activity.[13]

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13. Every circuit has recognized this rule:

First Circuit:
Miley v. John Hancock Mutual Life Insurance Co. (D.Mass. 1957) 148 F.Supp. 299, 303, affirmed (1 Cir. 1957) 242 F.2d 758, certiorari denied (1957) 355 U.S. 828; *Robinson v. Stanley Home Products, Inc.* (D.Mass. 1959) 178 F.Supp. 230, 233-34, affirmed (1 Cir. 1959) 272 F.2d 601; *Snow Crest Beverages v. Recipe Foods* (D.Mass. 1956) 147 F.Supp. 907, 909.

Second Circuit:
Billy Baxter, Inc. v. Coca-Cola Company (2 Cir. 1970) 431 F.2d 183, certiorari denied (1971) 401 U.S. 923; *Fields Productions, Inc. v. United Artists Corporation* (2 Cir. 1970) 432 F.2d 1010, certiorari denied (1971) 401 U.S. 949; *SCM Corporation v. Radio Corporation of America* (2 Cir. 1969) 407 F.2d 166, 170-171, certiorari denied (1969) 395 U.S. 943; *Productive Inventions v. Trico Products Corp.* (2 Cir. 1955) 224 F.2d 678, 679, certiorari denied (1956) 350 U.S. 936.

Third Circuit:
Kauffman v. Dreyfus Fund, Inc. (3 Cir. 1970) 434 F.2d 727, 732, 733-734, certiorari denied (1971) 401 U.S. 974; *Ash v. International Business Machines, Inc.* (3 Cir. 1965) 353 F.2d 491, 493-494, certiorari denied (1966) 384 U.S. 927; *Melrose Realty Co. v. Loew's, Incorporated* (3 Cir. 1956) 234 F.2d 518, certiorari denied (1956) 352 U.S. 890; *Harrison v. Paramount Pictures* (E.D.Pa. 1953) 115 F.Supp. 312, 317, affirmed (3 Cir. 1954) 211 F.2d 405, certiorari denied (1954) 348 U.S. 828.

Fourth Circuit:
South Carolina Council of Milk Producers, Inc. v. Newton (4 Cir. 1966) 360 F.2d 414, 419, certiorari denied (1966) 385 U.S. 934.

Fifth Circuit:
Dailey v. Quality School Plan, Inc. (5 Cir. 1967) 380 F.2d 484, 487-488; *Peter v. Western Newspaper Union* (5 Cir. 1953) 200 F.2d 867, 872-73; *Coast v. Hunt Oil Co.* (5 Cir. 1952) 195 F.2d 870, 872, certiorari denied (1952) 344 U.S. 836.

While results have varied depending upon the particular facts of each case, the principle under which these decisions were reached has remained uniform, and this Court has denied certiorari in at least sixteen cases involving application of the standing rule.[14] Contrary to Hawaii's assertion

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Sixth Circuit:
Volasco Products Company v. Lloyd A. Fry Roofing Company (6 Cir. 1962) 308 F.2d 383, 395, certiorari denied (1963) 372 U.S. 907; *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.* (6 Cir. 1961) 298 F.2d 356, 359.

Seventh Circuit:
Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co. (7 Cir. 1963) 315 F.2d 564, 566-567 certiorari denied sub nom. *Illinois v. Commonwealth Edison Co.* (1963) 375 U.S. 834.

Eighth Circuit:
Sanitary Milk Producers v. Bergjans Farm Dairy, Inc. (8 Cir. 1966) 368 F.2d 679, 688-689; *Duff v. Kansas City Star Company* (8 Cir. 1962) 299 F.2d 320, 323.

Ninth Circuit:
Hoopes v. Union Oil Company of California (9 Cir. 1967) 374 F.2d 480, 485; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190, 220, certiorari denied (1964) 379 U.S. 880; *Karseal Corporation v. Richfield Oil Corporation* (9 Cir. 1955) 221 F.2d 358, 363-65; *Conference of Studio Unions v. Loew's Inc.* (9 Cir. 1951) 193 F.2d 51, 54-5, certiorari denied (1952) 342 U.S. 919.

Tenth Circuit:
Nationwide Auto Appraiser Serv. v. Association of C. & S. Co. (10 Cir. 1967) 382 F.2d 925, 928-929.

14. *Billy Baxter, Inc. v. Coca-Cola Company* (2 Cir. 1970) 431 F.2d 183, certiorari denied (1971) 401 U.S. 923; *Kauffman v. Dreyfus Fund, Inc.* (3 Cir. 1970) 434 F.2d 727, certiorari denied (1971) 401 U.S. 974; *Mulvey v. Samuel Goldwyn Productions* (9 Cir. 1970) 433 F.2d 1073, certiorari denied (1971) ..... U.S. ..... (39 USLW 3456 April 19, 1971); *Fields Productions, Inc. v. United Artists Corporation* (2 Cir. 1970) 432 F.2d 1010, certiorari denied (1971) 401 U.S. 949; *SCM Corporation v. Radio Corporation of America* (2 Cir. 1969) 407 F.2d 166, certiorari denied (1969) 395 U.S. 943; *South Carolina Council of Milk Producers, Inc. v. Newton* (4 Cir. 1966) 360 F.2d 414, certiorari denied (1966) 385 U.S. 934; *Ash v. International Business Machines, Inc.* (3 Cir. 1965) 353 F.2d 491, certiorari denied (1966) 384 U.S. 927; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190,

of a generally narrow attitude on the part of the lower Federal courts, decisions involving standing have been marked by liberality. Indeed, as Hawaii has admitted, "it has been the Ninth Circuit itself which has led the way toward the more enlightened view of standing" under section 4 (Br. 58).[15]

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certiorari denied (1964) 379 U.S. 880; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.* (7 Cir. 1963) 315 F.2d 564, certiorari denied sub nom. *Illinois v. Commonwealth Edison Co.* (1963) 375 U.S. 834; *Volasco Products Company v. Lloyd A. Fry Roofing Company* (6 Cir. 1962) 308 F.2d 383, certiorari denied (1963) 372 U.S. 907; *Miley v. John Hancock Mutual Life Insurance Co.* (1 Cir. 1957) 242 F.2d 758, certiorari denied (1957) 355 U.S. 828; *Productive Inventions v. Trico Products Corp.* (2 Cir. 1955) 224 F.2d 678, certiorari denied (1956) 350 U.S. 936; *Melrose Realty Co. v. Loew's, Incorporated* (3 Cir. 1956) 234 F.2d 518, certiorari denied (1956) 352 U.S. 890; *Harrison v. Paramount Pictures* (3 Cir. 1954) 211 F.2d 405, certiorari denied (1954) 348 U.S. 828; *Conference of Studio Unions v. Loew's Inc.* (9 Cir. 1951) 193 F.2d 51, certiorari denied (1952) 342 U.S. 919; *Coast v. Hunt Oil Co.* (5 Cir. 1952) 195 F.2d 870, certiorari denied (1952) 344 U.S. 836.

In the *Billy Baxter* case, first cited *supra*, the Court of Appeals for the Second Circuit said (431 F.2d 187):

> "While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question. * * * The private action, intended as 'an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws,' * * * can only serve as an effective deterrent if the courts are able to administer it with some degree of certainty. Contourless rules of causation would pose the threat of a parallel relaxation of the standard of business behavior enforced by the allowance of treble recovery. Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act" (citations omitted).

15. Citing *Mulvey v. Samuel Goldwyn Productions* (9 Cir. 1970) 433 F.2d 1073, certiorari denied (1971) ..... U.S. ..... (39 USLW 3456 April 19, 1971); *Hoopes v. Union Oil Company of California*

There is clearly no basis, then, for Hawaii's accusation that the decision of the court below reflects an "'anti-antitrust' attitude" (Br. 17). Nor is there any basis for Hawaii's conclusion that the court below "failed to recognize or even address itself to the more recent and enlightened line of" standing cases (Br. 58).[16] The court obviously was cognizant of and adhered to its own decisions on the subject. However, it is not surprising that, despite its liberal view of the standing rule, it found the injury alleged here to the general economy and prosperity of the state to be "indirect and consequential to a degree and in a sense far beyond that usually discussed in this connection" and "far outside the area of directness contemplated by the Clayton Act" (App. 106). Indeed, it strains the imagination to think of claims of "injury" more filtered, indirect and remote than the seven specifications of "injuries" and "adverse effects" upon the state's general "economy and prosperity" alleged in Count Two of the complaint (*supra*, p. 3).[17]

(9 Cir. 1967) 374 F.2d 480; and *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964) 328 F.2d 190, certiorari denied (1964) 379 U.S. 880. One would be hard pressed to find better examples of a consistently liberal attitude than in the decisions of the court below.

16. Hawaii also seeks to support its position with quotations taken out of context from *Mandeville Island Farms v. Sugar Co.* (1948) 334 U.S. 219; *Radovich v. Nat. Football League* (1957) 352 U.S. 445, 453-454; *Radiant Burners v. Peoples Gas Co.* (1961) 364 U.S. 656, 660; *Perma Mufflers v. Int'l. Parts Corp.* (1968) 392 U.S. 134 and *Lawlor v. National Screen Service* (1955) 349 U.S. 322 (Br. 17, 57). No one of these cases involved or discussed the issue of standing. Hawaii also cites *Perkins v. Standard Oil Co.* (1969) 395 U.S. 642 (Br. 48, 49). But in that case this Court recognized the standing rule, holding that plaintiff was "directly injured" by the price discrimination charged (395 U.S. 649-650).

17. Compare *Georgia v. Evans*, supra (316 U.S. 162-3), where this Court recognized the right of a state to sue for treble damages under section 4 "when it is the immediate victim" of an antitrust violation, thus putting states on a par with other purchasers so injured.

III. HAWAII HAS NO STANDING TO SUE AS PARENS PATRIAE EITHER FOR AN INJUNCTION OR FOR DAMAGES ARISING FROM THE ALLEGED WRONG SET OUT IN THE COMPLAINT HEREIN.

Over and beyond the sound and sufficient grounds stated by the court below and discussed in Point I above, Hawaii's claim as *parens patriae* is wholly wanting in merit for failure to state a claim justiciable in an action *parens patriae,* either for damages or for injunctive relief.

In this connection we reemphasize that in the very few instances in which this Court has sustained the extraordinary right of a state to sue in its capacity as *parens patriae* it has carefully noted that such suits lie only to protect the so-called "quasi-sovereign" interests of the state in the health, safety and welfare of its citizens as a whole — interests which a private party would have no standing to raise. Such interests, this Court has pointed out, are of a type which are "independent of and behind the titles of its citizens, in all the earth and air within its domain" (*Georgia v. Tennessee Copper Co.* (1907) 206 U.S. 230, 237); which "'affect the public at large, and are in respect of matters * * * concerning which the Nation owes the duty to all the citizens of securing to them their common rights'" (*Louisiana v. Texas* (1900) 176 U.S. 1, 19); which rise "above a mere question of local private right and [involve] a matter of state interest" (*Kansas v. Colorado* (1907) 206 U.S. 46, 99). They must be of a character which, absent the Union of states created by the Constitution, would be settled by diplomacy or war (*Missouri v. Illinois & Chicago District* (1901) 180 U.S. 208, 241); they must involve matters "of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected" (*Penna. v. West Virginia* (1923) 262 U.S. 553, 592). The "State

must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest" (*Oklahoma v. Cook* (1938) 304 U.S. 387, 396).

The complaint in this case alleges a conventional anti-trust suit, a conspiracy to fix prices on a consumer product. The wrong, if one be proved, falls directly upon the purchasers of the product, including the State of Hawaii as a buyer. Such purchasers, including the State of Hawaii in its proprietary capacity, are the real parties in interest. Each has a ready and specific remedy provided by the statute which creates the wrong, including the right to bring proper class actions under Rule 23. The above and other decisions of this Court extending over the course of nearly 100 years make it clear that such a complaint does not state a cause of action which a state may assert *parens patriae*, either for damages or for an injunction. This is immediately evident if the allegations of the complaint in the case at bar are compared with those in *Oklahoma v. A., T. & Santa Fe Ry.* (1911) 220 U.S. 277.

In the *Oklahoma* case, the State of Oklahoma filed a bill of complaint seeking to invoke the original jurisdiction of this Court. Whether such a suit would lie turned—as does the present case—upon the question whether the bill of complaint alleged a cause of action possessed by the state *qua* state. The bill alleged that the defendant railroads were charging the inhabitants of Oklahoma excessive rates on crude and refined oil, lime, cement, plaster, brick and stone. It then alleged (220 U.S. 283-284):

> "That the State of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma

there are very large and extensive petroleum oil wells, and the manufacture or refining of the same is an industry continually growing in said State; that the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said State; and, that the violation by said respondent of the said conditions of said grant is a menace to the future of said State.'"

And the bill further alleged (220 U.S. 284):

"* * * that if the defendant was permitted further to operate the railroad in violation of the condition of the grant it would be a hindrance to the growth of the State, as well as an injury to the property rights of its inhabitants."

This Court dismissed the suit. It quoted from *Louisiana v. Texas* (1900) 176 U.S. 1, the test for determining whether a complaint states a cause of action which can be asserted by a state as *parens patriae* (220 U.S. 288):

"'* * * it must appear that the controversy to be determined is * * * not a controversy in the vindication of grievances of particular individuals. * * * But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the mal-administration of the laws of another.'"

And held (220 U.S. 289):

"These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution."

Further, notwithstanding the conclusional allegations in the bill of complaint of hindrance to the growth of the

state—allegations which are substantially identical to those in the case at bar—this Court rejected the view (220 U.S. 289):

> "• • • that jurisdiction could be invoked by a State, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured."

And the Court concluded (220 U.S. 289):

> "We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people • • •."

Petitioner says that this ruling is no longer authoritative because of this Court's later decision in *Georgia v. Pennsylvania R. Co., supra.* This is not so. In *Georgia* this Court carefully distinguished and expressly approved and reaffirmed its ruling in *Oklahoma* (324 U.S. 451-452):

> "*Oklahoma v. Atchison, T. & S.F.R. Co., supra,* is not opposed to this view. • • • Oklahoma sued • • • to enjoin • • • the exaction of greater rates than the maximum rates specified. • • • The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We

adhere to that decision. It does not control the present one. This is no attempt to utilize our original jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers."

What, then, was the "gravamen" of the charge in the *Georgia* case which distinguished it from the complaint in *Oklahoma* and also, in turn, from the complaint in the case at bar?

In *Georgia,* the amended bill alleged that the 20 principal railroads operating throughout the United States east of the Mississippi River, and 60 rate bureaus and related agencies, had united to fix rates and charges on transportation to and from Georgia, so as to discriminate against Georgia *as a state,* thus denying Georgia's products equal access with those of other states to the national market and restricting the state's manufacture, shipping and commerce. These allegations were crucial to the decision of the majority. The Court said (324 U.S. 445):

"• • • we construe the allegation • • • as a charge that defendants have conspired to fix rates so as to discriminate against Georgia."

And, for emphasis, it repeated (324 U.S. 462):

"As we have said, we construe the bill to charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed. We hold that under that construction of the bill a cause of action under the anti-trust laws is alleged."

This kind of extraordinary allegation—of a conspiracy aimed at the state *as such* to erect, by coercion, a trade barrier around the state—this Court felt fitted the category of injury to the state in its capacity as *parens patriae* (324 U.S. 450-451):

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. * * * Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. * * *
>
> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. * * * Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected."[18]

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18. The Special Master in *Georgia* (Lloyd K. Garrison) found that the evidence wholly failed to support the extraordinary allegation that Georgia had been the victim of a conspiracy directed against it as a state. In consequence, he found that Georgia had no standing to sue *parens patriae* (Report of the Special Master, pp. 201, et seq.).

Shortly after this Court's decision in *Georgia*, Congress passed the Bulwinkle Act (62 Stats. 472) giving the Interstate Commerce Commission authority to approve combinations of the character in-

No such allegation—of a throttling conspiracy directed against the state as such—is or could be made in the instant case. The complaint alleges simply that three of the seven companies selling petroleum products in Hawaii conspired to fix the prices of such products.[19] If this charge be proved, the direct impact of the conspiracy falls upon Hawaii in its proprietary capacity as a purchaser of petroleum products and upon other buyers of such products. Each purchaser has an immediate, conventional remedy to enjoin the alleged conspiracy and to recover treble damages. *Oklahoma* establishes and *Georgia* confirms that such a complaint does not state a cause of action *parens patriae*. *Oklahoma* establishes and *Georgia* confirms that the court will look through general and conclusional allegations of injury to the economy and prosperity of a state to see what in truth is the gravamen of the charge in the complaint. And where, as here, the cause of action alleged is simply a wrong directed at individual citizens, including the state in its proprietary capacity, general allegations added in the complaint of injury to the

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volved in the *Georgia* case and thereby immunize them from the antitrust laws (see *Pan American World Airways v. U.S.* (1963) 371 U.S. 296, 306, fn. 11).

The *Georgia* case was dismissed *per curiam*, by consent of all parties, after the Master's Report was filed (339 U.S. 975) but before it was considered by the Court (340 U.S. 889).

Of this case Professor Freund has since remarked:

> "Whatever strategic end may have been achieved through the earlier overruling of a motion to dismiss * * * the complete inability of the state to make good its claim of injury as *parens patriae* suggests that in the future the Court may be more wary of sweeping allegations of detriment to a state's economy as a basis of a case or controversy" (Freund, Book Review (1951) 3 J.Leg.Ed. 643, 644, n. 2).

19. Texaco, Phillips (formerly Tidewater), Time and Armour also market petroleum products in Hawaii (App. 42).

economy of the state will not be held to convert an ordinary tort action into a suit which the state has standing to assert as *parens patriae*.

IV. PETITIONER'S CONTENTION THAT THE CITIZENS OF HAWAII HAVE NO PRACTICAL REMEDY IS WITHOUT BASIS.

Petitioner argues that "respondents have predatorily preyed upon the numerous petroleum product consumers in Hawaii" (Br. 26) and that, by dismissing the class action count (Count Three), the district court recognized "that the individual citizen-consumers of the products involved • • • have no practical or effective individual remedy in their own right," so that "the present action by the State of Hawaii, as *parens patriae*, • • • becomes the only meaningful and effective alternative to permitting the respondents to retain nearly all or a substantial portion of the illicit profits which they derived from their illegal price fixing conspiracy" (Br. 11, 13-14). The argument permeates the brief (e.g., Br. 4, 5, 18, 22-27). Not only is it unsound for the reasons discussed in the text above, it has no factual basis in the record. The district court did not rule that a proper class action or actions are not possible, and no such question was presented to it. It decided only that a class composed of every purchaser of petroleum products in Hawaii was unmanageable. Its ruling was without prejudice (App. 80). At the very moment when the district court stated that it would certify its *parens patriae* ruling for interlocutory appeal, the court offered to certify its class action ruling for simultaneous interlocutory appeal, and petitioner rejected the offer (App. 81).

Arguments similar to those made by Hawaii were considered and rejected in the *Philadelphia Housing Authority* case, *supra*,[20] and by the district court in the present case.[21]

We recognize that the allegations of conspiracy in the complaint, although denied, must be accepted as true for the purposes of a motion to dismiss. But petitioner indulges in constant immoderate characterizations of respondents' conduct in a manner nowhere alleged in the complaint: "enormous profits," "millions of dollars in illicit profits" extracted from Hawaii by a "monumental illegality and wrong-doing" involving "flagrant" wrongs in which respondents "preditorily preyed" upon Hawaii's consumers (e.g., Br. 13, 14, 22, 24, 26, 65). We therefore think it not inappropriate to point

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20. "But plaintiffs contend that if this Court denies them the right to amend their complaints so as to assert [*parens patriae*] claims to recover damages on behalf of individual citizen-consumers, those citizens with small stakes in this massive litigation will have no adequate remedy to vindicate their rights against defendants. • • • For they contend that the individual citizens cannot as a practical matter sue for themselves or get an adequate remedy in situations like those of the present cases.

"The Court cannot accept plaintiffs' argument. In the 113 cases now before this Court for pretrial proceedings, there are numerous cases in which various plaintiffs claim the right to represent as classes under Rule 23 individual homeowners, owners of apartment houses, owners of commercial buildings and others at the consumer-level alleged to have sustained injury. • • • Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject" (309 F.Supp. 1062-63).

21. "Thus the state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, Fed. R. Civ. P. The two *theories for recovery* of damages are separate and distinct" (App. 88-89).

out that documents produced by petitioner in the district court disclose that the Antitrust Division of the Department of Justice conducted an investigation of gasoline prices in Hawaii without taking any action, and that the Federal Trade Commission, although requested by the Deputy Attorney General of Hawaii to investigate the gasoline industry in Hawaii, refused to do so "especially in the absence of any evidence which would indicate the presence of unlawful practices."[22] The letter of the Deputy Attorney General of Hawaii requesting this investigation, dated March 23, 1965, stated, "we have no evidence of price fixing at any level * * *."

22. Letter of Federal Trade Commission dated April 6, 1965.

CONCLUSION

For each of the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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